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National Environmental Policy Act

Discussion on National Environmental Policy Act

The National Environmental Policy Act (NEPA) is the federal law which sets the basis for environmental protection. NEPA applies only to federal actions, such as the granting of a federal permit or the federal government conducting a development project itself. It is very important for the department to comment on environmental concerns during the NEPA process, to protect the department's rights to take action on these concerns later.

NEPA requirements are very similar to State Environmental Policy Act (SEPA) requirements. An environmental assessment is used by the lead agency to determine the extent of environmental impacts associated with the project. If the project is determined to be environmentally significant, an Environmental Impact Statement (EIS) is required. If the NEPA lead agency determines a project will not significantly impact the environment, that agency issues a Finding of No Significant Impact.

A state or local agency may adopt a NEPA document as a SEPA document if the original document is found to be adequate. When both NEPA and SEPA documents are required, the NEPA and SEPA processes may be combined and a joint federal/state EIS may be prepared.

With regard to NEPA, staff should:

- # Routinely check for federal environmental review processes in their assigned area. One way to keep ahead of these projects is through routine communications with local federal agency representatives. Another way is to check the EPA-NEPA homepage on the Internet at <http://es.epa.gov/oeca/ofa>. This homepage has current information on EISs in the review stage and summaries of comments submitted on EISs. NEPA information is also available through Ecology's SEPA register.
- # Bring any project subject to federal permits and NEPA to the attention of the land manager's supervisor, the department's SEPA Center, the Region SEPA coordinator, and Division SEPA coordinator. Major projects may require a coordinated review, and if so, these projects must be raised to executive management either for information or for direct policy involvement.

If public hearings are held on a project that has the potential to have major impacts on state-owned aquatic lands, the department should be present at the hearings and prepared to offer comments and concerns. Staff should work with the Region or Division SEPA coordinators on the comments to be submitted. Such comments should be coordinated between the Region and the Division. Comments should be thorough, diplomatic and submitted in a timely fashion. Copies of comments should be forwarded to the department SEPA Center, Region SEPA coordinator, and Division SEPA coordinator.

SEE ALSO: State Environmental Policy Act.

Natural resource damage assessments

Discussion on natural resource damage assessments

Several laws allow for the recovery of damages for injuries to natural resources. CERCLA, MTCA, and state and federal oil pollution laws cover injuries that may result from oil spills or other hazardous substances. SEE ALSO: Pollution laws.

Under these laws, trustee agencies, including the department, may pursue responsible parties to recover damages for injury to, destruction or loss of natural resources, including restoration costs and the reasonable costs of assessing such injury, destruction or loss. The objective is to make sure the natural resource is restored, not merely that the contamination is removed or the unauthorized use is halted. Usually, a lead administrative trustee agency, which may or may not be the department, is appointed to facilitate response by all interested trustee agencies.

Natural resource damage assessments and other legal action to recover damage will be directed by the Division. Region staff can contribute to natural resource damage assessments by promptly reporting any spills, trespasses, or harm to state-owned aquatic lands. Reports should be provided to Division staff. If the situation is an emergency, notify appropriate law enforcement, Coast Guard, or spill response staff.

In addition to natural resource damage assessment laws, the department can address trespasses and other unauthorized uses and activities which damage state-owned aquatic lands. Region staff should report and document such uses and activities promptly to allow the department to best respond to them. SEE ALSO: Unauthorized uses.

Navigation

RCW 88.28.050: Obstructing navigation--Penalty.

Every person who shall in any manner obstruct the navigable portion or channel of any bay, harbor, or river or stream, within or bordering upon this state, navigable and generally used for the navigation of vessels, boats, or other watercrafts, or for the floating down of logs, cord wood, fencing posts or rails, shall, on conviction thereof, be fined in any sum not exceeding three hundred dollars: PROVIDED, That the placing of any mill dam or boom across a stream used for floating saw logs, cord wood, fencing posts or rails shall not be construed to be an obstruction to the navigation of such stream, if the same shall be so constructed as to allow the passage of boats, saw logs, cord wood, fencing posts or rails without unreasonable delay: PROVIDED FURTHER, That the obstruction of navigable waters for the purpose of deploying equipment to contain or clean up a spill of oil or other hazardous material shall not be considered an obstruction.

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to state-wide interests as distinguished from local interests.

WAC 332-30-106 Definitions.

(40) "Navigability or navigable" means that a body of water is capable or susceptible of having been or being used for the transport of useful commerce. The state of Washington considers all bodies of water meandered by government surveyors as navigable unless otherwise declared by a court.

(41) "Navigation" means the movement of vessels to and from piers and wharves.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(8) Whenever structures are used for aquaculture on the beds of navigable waters, they shall be located in such a way as to minimize the interference with navigation and fishing and strive to reduce adverse visual impacts.

(12) Insofar as possible uses of these aquatic lands shall have a minimum interference with surface navigation.

WAC 332-30-144: Private recreational docks.

(5) Revocation. The permission [for a private recreational dock] may be revoked or canceled if:

(b) The dock significantly interferes with navigation or with navigational access to and from other upland properties. This degree of interference shall be determined from the character of the shoreline and water body, the character of other in-water development in the vicinity, and the degree of navigational use by the public and adjacent property owners;

Discussion on navigation

Whenever the department considers granting authorization to use state-owned aquatic lands, it must seek the "minimum interference with surface navigation." In particular, according to the state Constitution, harbor areas and waterways are specifically reserved for the "conveniences of navigation and commerce." SEE ALSO: Use authorizations; Harbor areas; Waterways.

Nonwater-dependent uses

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall

be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to state-wide interests as distinguished from local interests.

(2) Nonwater-dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area.

RCW 79.90.465: Definitions.

(3) "Nonwater-dependent use" means a use which can operate in a location other than on the waterfront. Examples include, but are not limited to, hotels, condominiums, apartments, restaurants, retail stores, and warehouses not part of a marine terminal or transfer facility.

Discussion on nonwater-dependent uses

The Legislature recognized nonwater-dependent uses of state-owned aquatic lands as low-priority uses which provide minimal public benefits. Even as the department encourages and fosters water-dependent uses on state-owned aquatic lands, it may not authorize nonwater-dependent uses except in very limited circumstances. Nonwater-dependent uses must always yield to water-dependent uses, and, if allowed at all, must be compatible with water-dependent uses which either already exist or are planned. The department will strongly discourage and usually not authorize the establishment or expansion of nonwater-dependent uses on state-owned aquatic lands.

The definition in RCW 79.90.465 is not an exhaustive list of nonwater-dependent uses. The key to deciding what is or is not a nonwater-dependent use is determining whether the use must be on the water itself. If the activity would merely be more convenient to have on the water, but does not need to be there, it is not water-dependent. Also, if the activity

should be near the water, but does not need to be on it, it is not water-dependent. In these cases, the use will be either water-oriented or nonwater-dependent. Water-oriented uses is a limited category for historic waterfront activities. If in doubt, a use is to be considered nonwater-dependent.

SEE ALSO: Public benefits, Water-dependent uses; Water-oriented uses.

As further described below, the department will reject an application for a lease or re-lease of a nonwater-dependent use of state-owned aquatic lands if:

- There are no qualifying exceptional circumstances;
- The use is incompatible with existing or planned water-dependent uses;
- The use will conflict with the other public benefits of aquatic lands, or with any aquatic uses or resources of state-wide value; or
- The use will cause significant adverse environmental impacts.

NONWATER-DEPENDENT USES: ENVIRONMENTAL PROTECTION

WAC 332-30122: Aquatic Land Use Authorization.

(2) Application review. In addition to other management considerations, the following special analysis shall be given to specific proposed uses:

- (a) Environment.
 - (iii) Nonwater-dependent uses which have significant adverse environmental impacts shall not be authorized.

Discussion on nonwater-dependent uses: environmental protection

If a nonwater-dependent use causes any significant adverse environmental impacts, the use must be altered or re-designed to completely avoid the impacts or the department will reject the application for the nonwater-dependent use. In

terms of mitigation, this means the damage to aquatic habitat or other ecological functions must be avoided, not merely compensated for by replacing habitat elsewhere. SEE ALSO: Environmental protection; Mitigation.

NONWATER-DEPENDENT USES: EXCEPTIONAL CIRCUMSTANCES AND COMPATIBILITY WITH WATER- DEPENDENT USES

WAC 332-30-137: Nonwater-dependent uses.

Policy. Nonwater-dependent use of state- owned aquatic lands is a low priority use providing minimal public benefits.

Nonwater-dependent uses shall not be permitted to expand or be established in new areas except in exceptional circumstances and when compatible with water-dependent uses existing in or planned for the area. Analysis under this section will be used to determine the terms and conditions of allowable nonwater-dependent use leases. The department will give public notice of sites proposed for nonwater-dependent use leases.

(1) Exceptional circumstances. The following are exceptional circumstances when nonwater-dependent uses may be allowed:

- (a) Nonwater-dependent accessory uses to water-dependent uses such as delivery and service parking, lunch rooms, and plant offices.
- (b) Mixed water-dependent and nonwater-dependent development. The water-dependent component shall be a major project element. The nonwater-dependent use shall significantly enhance water- dependent uses and/or resources of state-wide value.
- (c) Nonwater-dependent uses in structures constructed, or on sites filled, prior to June 30, 1985.
- (d) Expansion or realignment of essential public nonwater-dependent facilities such as airports, highways and sewage treatment plants where upland topography, economics, or other factors preclude alternative locations.
- (e) When acceptable sites and circumstances are identified in adopted local shoreline management master programs which

provide for the present and future needs of all uses and resources of state-wide value, identify specific areas or situations in which nonwater-dependent uses will be allowed, and justify the exceptional nature of those areas or situations.

(2) Compatibility with water-dependent uses. Nonwater-dependent uses will only be allowed when they are compatible with water-dependent uses existing in or planned for the area.

Evaluation of compatibility will consider the following:

- (a) Current and future demands for the site by water-dependent uses.
- (b) The effect on the usefulness of adjacent areas for water-dependent uses.
- (c) The probability of attracting additional water-dependent or nonwater-dependent uses.
- (d) Subsidies offered to water-dependent uses.

(3) Evaluation. Proposed nonwater-dependent uses will be evaluated individually. Applicants must demonstrate the proposed nonwater-dependent uses are consistent with subsections (1) and (2) of this section and any other applicable provisions of this chapter.

Discussion on nonwater-dependent uses: exceptional circumstances and compatibility with water-dependent uses

An “accessory use” to a water-dependent use means that the accessory must be a minor element of the entire use, and must be necessary to have on-site to support the larger water-dependent activity or facility. It would not be acceptable to have a nonwater-dependent accessory which is merely useful to the applicant, as opposed to necessary, or which could effectively be located at another site away from state-owned aquatic lands.

Examples of a mixed water-dependent/nonwater-dependent development include parking on a pier for a boat tour company, waterfront food service, a news stand at a ferry terminal, or water taxi service.

These various criteria apply to all nonwater-dependent uses on state-owned aquatic lands. The determination of whether any of these criteria are met is made exclusively by the department, based on the best information available to staff. This determination must be made before an initial lease, before a re-lease, whenever the use significantly changes, and whenever the department has the option of altering or terminating the lease, such as through a re-opener clause.

NONWATER-DEPENDENT USES: RE-LEASES

WAC 332-30-137: Nonwater-dependent uses.

(4) Re-leases. Re-leases of nonwater-dependent uses will be evaluated as new uses. If continuance of the nonwater-dependent use substantially conflicts with uses or resources of state-wide value or with shoreline master program planning or supplemental planning developed under WAC 332-30-107(5), or if the site is needed by a use of state-wide value, the re-lease will not be approved.

Discussion on nonwater-dependent uses: re-leases

When a lease expires, an application for re-lease for a nonwater-dependent use will be evaluated as an entirely new use. To receive a new lease, the nonwater-dependent use must – at the time of re-application – meet a qualifying exceptional circumstance, be compatible with existing and planned water-dependent uses, not conflict with other public benefits, and not cause significant adverse environmental impacts. This is true no matter why or how the nonwater-dependent use was originally authorized.

In harbor areas, there is an additional specific statutory obligation to evaluate the public's water-dependent needs prior to re-leasing a nonwater-dependent use. SEE ALSO: Harbor areas.

If the nonwater-dependent use is re-leased, the tenant must pay current full market rent, established in the same manner as for other nonwater-dependent uses, regardless of the previous rental rate.

NONWATER-DEPENDENT USES: RENT

RCW 79.90.500: Aquatic lands--Rents for nonwater-dependent uses--Rents and fees for the recovery of mineral or geothermal resources.

Leases for nonwater-dependent uses of state-owned aquatic lands shall be charged the fair market rental value of the leased lands, determined in accordance with appraisal techniques specified by rule. However, rents for nonwater-dependent uses shall always be more than the amount that would be charged as rent for a water-dependent use of the same parcel. Rents and fees for the mining or other recovery of mineral or geothermal resources shall be established through competitive bidding, negotiations, or as otherwise provided by statute.

WAC 332-30-106 Definitions.

(19) "Fair market value" means the amount of money which a purchaser willing, but not obligated, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied (Donaldson v. Greenwood, 40 Wn.2d 238, 1952). Such uses must be consistent with applicable federal, state and local laws and regulations affecting the property as of the date of valuation.

WAC 332-30-125: Aquatic land use rental rates for nonwater-dependent uses.

All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) The value of state-owned aquatic lands withdrawn from general public use for private nonwater-dependent use shall be recognized by charging lessees the full fair market rental. No rent shall be charged for improvements, including fills, on aquatic lands unless owned by the state. The fair market rental is based on:

(a) Comparable non-DNR market rents, whether based on land value exclusive of improvements, a percent of gross revenues, or other appropriate basis, or if not available (b) the full market value (same as true and fair value) multiplied by the use rate percentage as determined under subsection (2) of this section and published in the Washington State Register.

(2) Use rate percentage.

(a) The percentage rate will be based on nondepartmental market rental rates of return for comparable properties leased on comparable terms in the locality, or when such do not exist;

(b) The percentage rate of return shall be based on the average rate charged by lending institutions in the area for long term (or term equivalent to the length of the lease) mortgages for comparable uses of real property.

(3) Appraisals: The determination of fair market value shall be based on the indications of value resulting from the application of as many of the following techniques as are appropriate for the use to be authorized:

(a) Shore contribution; utilizing differences in value between waterfront properties and comparable nonwaterfront properties. Generally best for related land-water uses which are independent of each other or not needed for the upland use to exist.

(b) Comparable upland use (substitution); utilizing capacity, development, operation, and maintenance ratios between a use on upland and similar use on aquatic land with such ratios being applied to upland value to provide indication of aquatic land value for such use. Generally best for aquatic land uses which are totally independent of adjacent upland yet may also occur on upland totally independent of direct contact with water.

- (c) Extension; utilizing adjacent upland value necessary for total use as the value of aquatic lands needed for use on a unit for unit basis. Generally best for aquatic land uses which are integrated with and inseparable from adjacent upland use.
- (d) Market data; utilizing verified transactions between knowledgeable buyers and sellers of comparable properties. Generally best for tidelands or shorelands where sufficient data exists between knowledgeable buyers and sellers.
- (e) Income; utilizing residual net income of a commercial venture as the indication of investment return to the aquatic land. This can be expressed either as a land rent per acre or as a percent of gross revenues. Generally best for income producing uses where it can be shown that an owner or manager of the operation is motivated to produce a profit while recognizing the need to obtain returns on all factors of production.
- (4) Negotiation of rental amounts may occur when necessary to address the uniqueness of a particular site or use.
- (5) Rental shall always be more than the amount that would be charged if the aquatic land parcel was used for water-dependent purposes.

WAC 332-30-106 Definitions.

(19) "Fair market value" means the amount of money which a purchaser willing, but not obligated, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied (Donaldson v. Greenwood, 40 Wn.2d 238, 1952). Such uses must be consistent with applicable federal, state and local laws and regulations affecting the property as of the date of valuation.

Discussion on nonwater-dependent uses: rent

If a nonwater-dependent use is allowed, rent must be paid to the state. This rent does not follow the water-dependent rent formula. Instead, rent for a nonwater-dependent use is based on the fair market rental value of the leased aquatic lands. Nonwater-dependent uses are not to be encouraged nor subsidized by allowing them to pay rent below full market rates.

In setting market rents for nonwater-dependent uses, the department is to behave as a responsible for-profit business, establishing a fair market value and appropriate percentage of that value as the annual rent. This is a very different approach from the traditional government system of setting fixed fees or formulae. It requires staff to think more as private business would – to consider the values the applicant or other potential users would gain from the land, and to think of how much economic value they will give in return.

The department is the manager of state-owned aquatic lands on behalf of all the citizens of the state. A prudent manager of a business will seek to gain the maximum value for its owners, regardless of its role in the transaction – as buyer, seller, tenant or landlord. The goal for the department is not merely to raise the price, but to gain a fair return for the public based on the true market value of the land and the value of any lost or dedicated public resources.

The determination of rent for a nonwater-dependent use should begin with an appraisal of the land. Rather than use a standard formula, rent for each site must be determined based on the appropriate market conditions, values, and qualities of that site. Each appraisal or measure of market value will be different for different properties. The department should estimate the value by several methods, whenever feasible, with care taken to consider which methods may be most appropriate for the specific circumstances of each site and lease. These methods are described in WAC 332-30-125. For more on valuation and determining fair market value, SEE ALSO: Valuation.

After appraisal, rent for a nonwater-dependent use may be negotiated with the applicant to address unique sites or uses. In negotiations, the department must uphold the same principles of establishing a fair market value, gaining full fair market rent for the public, and appropriately compensating the state for the loss of public values.

The value the state receives in exchange for granting a nonwater-dependent use need not always be in money. Instead, the value could be in other forms which benefit the public, such as:

- A permanent easement on private aquatic lands for environmental or other purposes.
- Provision of public access.
- Provision of environmental restoration or clean up, beyond that otherwise required by law.
- Investment in infrastructure which does or will belong to the state, when the investment will create short-term or long-term benefits for the public.

Regardless of form, the department must insist on full market value for the public.

To ensure the rent is appropriate and the tenant is financially sound, the department may require the tenant to supply a business plan, financial pro forma, or other appropriate financial report for new uses and significant changes in existing uses. Again, this is based on how a responsible for-profit business would operate.

Rent paid by a nonwater-dependent use must always be greater than what a water-dependent use would pay. When leasing for a nonwater-dependent use, the department must also calculate the rent a water-dependent use would pay for the site. If the result according to the water-dependent rent formula is greater than the rent otherwise determined for the nonwater-dependent use, then the rent for the nonwater-dependent use must be increased to be higher.

Rent for use of fill which the state owns and has a right to charge for should also be based on fair market value, as provided in RCW 79.90.480. SEE ALSO: Fill.

Fair market rent must also be charged for improvements which the state owns and are to be used by the lessee. SEE ALSO: Improvements.

NONWATER-DEPENDENT USES: RENT INVOLVING WATER-DEPENDENT USES

Discussion on nonwater-dependent uses: rent involving water-dependent uses

If a nonwater-dependent use is conducted together with or in the same space as a water-dependent use, or if a lease for a water-dependent use is instead used for nonwater-dependent activities, the rent must account for both uses. SEE ALSO: Water-dependent uses.